IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

MARLENE DELCOURT
Plaintiff

V. No. 2:97-CV-199-B-B

BL DEVELOPMENT CORP., d/b/a
GRAND CASINO TUNICA
Defendant

MEMORANDUM OPINION

This cause comes before the court upon the defendant's motion for summary judgment and motion to strike the plaintiff's response thereto, as well as the plaintiff's motion for extension of time to file her response. Upon due consideration of the parties' memoranda and exhibits, the court is ready to rule.

FACTS

The plaintiff was hired as a housekeeper with the environmental services department ("EVS") of the Grand Casino on March 3, 1997. On April 7, 1997, the plaintiff told her supervisor, Tim Kinard, that she was pregnant and not feeling well. She left early, at Kinard's suggestion, to see a doctor. On April 8, 1997, the plaintiff brought in a doctor's note stating that she "should not do a large amount of walking or heavy lifting due to a medical situation. Please allow her to work without having to do so much walking." The plaintiff requested that she be assigned to one bathroom, rather than the usual two bathrooms, because she could not walk from one end of the casino to the other. The plaintiff was asked to see an obstetrician to obtain a more specific note regarding her work restrictions. However, in the meantime, the defendant placed the plaintiff in the laundry department, which is separate from EVS.

On April 20, 1997, the plaintiff was granted five days off to attend a funeral in Minnesota. When the plaintiff returned, on or about April 28, 1997, she was instructed to return to EVS. The plaintiff was assigned to the second-floor bathrooms, which was the least strenuous

job in EVS. However, later than day the plaintiff was told to leave and not return until a doctor released her to full duty. The plaintiff was initially given until May 2, 1997, to see a specialist and submit a new doctor's note. The plaintiff's time was thereafter extended, as the plaintiff had a doctor's appointment scheduled for May 6, 1997. However, when the plaintiff went to her appointment at the medical clinic, no doctor was there. The next earliest appointment the plaintiff could schedule was for June 6, 1997.

The defendant, having no positions in the EVS that do not require walking, and not having received a note from a physician releasing the plaintiff to full duty, terminated the plaintiff on May 23, 1997, effective April 28, 1997. The Personnel Action Notice memorializing the plaintiff's termination lists the reason for termination as "She is pregnant and under doctor's orders. Cannot perform job duty."

The plaintiff filed a charge of discrimination with the EEOC on May 14, 1997, prior to her termination, alleging sex discrimination on account of her pregnancy. On October 21, 1997, the plaintiff filed a second charge of discrimination with the EEOC alleging retaliatory discharge.

LAW

A. Motion to Strike and Motion for an Extension of Time

The plaintiff's response to the defendant's motion for summary judgment was due on September 4, 1998. On September 9, 1998, counsel for the plaintiff called counsel for the defendant and requested an extension of time to file the plaintiff's response. Counsel for the defendant refused as the response was already past due. The plaintiff then filed a motion, dated September 8, 1998, requesting a ten-day extension of time in which to file her response, to run from the date of the plaintiff's motion. On September 21, 1998, the plaintiff filed her response.

The defendant moves to strike the plaintiff's response as untimely. However, the court finds that the plaintiff's counsel has shown excusable neglect for their failure to respond in a timely manner. Around the time the defendant filed its motion for summary judgment, one of the plaintiff's two attorneys left his firm to join another. In the resulting confusion and increased workload for both of plaintiff's counsel, they failed to act with the ten-day response period.

There has been no prejudice to the defendant by the delay in filing a response to the motion for summary judgment. Accordingly, the court finds that the plaintiff should be granted an extension of time through September 21, 1998, to respond to the defendant's motion for summary judgment and that the defendant's motion to strike should be denied.

B. Motion for Summary Judgment

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'...that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

Title VII of the Civil Rights Act of 1964 prohibits various forms of employment discrimination, including discrimination on the basis of sex. Urbano v. Continental Airlines, 138 F.3d 204, 205-206 (5th Cir. 1998). With the passage of the Pregnancy Discrimination Act ("PDA") in 1978, Congress amended Title VII to state as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes...as other persons not so

affected but similar in their ability or inability to work....

42 U.S.C. § 2000e(k). A claim under the PDA is analyzed like Title VII discrimination claims in general. To establish a prima facie case of discrimination, the plaintiff may show: (1) that she was a member of a protected class; (2) that she was qualified for the position; (3) that she suffered an adverse employment action; and (4) that others similarly situated were treated more favorably. Id. at 206 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668 (1973)). Of course, the plaintiff may always present a prima facie case by providing direct evidence of discrimination. Id.

The plaintiff asserts that she has direct evidence of the defendant's discriminatory intent. First, she asserts that during her meeting with her supervisor on April 28, 1997, Kinard made repeated references to the plaintiff's pregnant condition. However, the plaintiff has failed to cite to any portion of the record that supports her contention. The plaintiff has not even provided any affidavit or deposition testimony of her own that recites the repeated references to her condition that she accuses Kinard of making. Even if the alleged repeated references could be construed as direct evidence of discrimination (which is doubtful), there simply is no evidence that any such alleged comments were made by Kinard or anyone else.

The plaintiff further asserts, as direct evidence of discrimination, that she was removed from the schedule and told not to return without a doctor's note releasing her to work without restriction. While the evidence indicates that this did, in fact, occur, it does not indicate any intent to discriminate on the basis of the plaintiff's pregnancy. All housekeepers at the Grand Casino must be in good physical condition, capable of constant walking. By the plaintiff's own admission, she could not walk from one end of the casino to the other. Thus, there was no job in the EVS department which the plaintiff was qualified to perform. After receiving a note from one physician indicating that the plaintiff could not perform the duties of her position, it was not unreasonable for the defendant to insist on having medical evidence that the plaintiff was capable of fully executing her duties before allowing her to return to work. To show any sort of discriminatory intent, the plaintiff would need to provide evidence that other employees of the

EVS department, who were not pregnant but who were limited in their ability to walk, had been granted variances in their schedules or work assignments to accommodate their condition. The plaintiff has failed to do so. The plaintiff has made the bald assertion that at least two other employees with non-job related injuries or medical conditions were offered temporary minimal adjustments in job schedules and work assignments. However, the plaintiff has not provided any specific evidence to support her contention, such as names of employees, description of medical conditions and limitations, and/or nature of adjustments made.

Finally, the plaintiff contends that the language on the Personnel Action Notice, wherein the plaintiff was terminated from her position, provides direct evidence of discrimination. Specifically, the Notice lists the reason for termination as: "She is pregnant and under doctor's orders. Cannot perform job duty." The court finds that this language does not provide evidence of a discriminatory intent. The Personnel Action Notice simply indicates that the plaintiff cannot fully perform the duties of her position due to medical restrictions placed upon her by her physician because of her pregnant condition. It does not indicate any sort of discriminatory animus toward pregnant employees. Again, if the plaintiff could show that non-pregnant employees with similar medical limitations were accommodated rather than terminated, the plaintiff would have evidence of discrimination. However, the plaintiff has not provided such evidence, and accordingly, the court finds that the plaintiff cannot show any direct evidence of discrimination. The plaintiff has likewise failed to make out a prima facie case under the traditional McDonnell Douglas showing, as, for the reasons set forth above, the plaintiff cannot show that she was qualified for the position or that other similarly situated employees were treated more favorably.

The court finds that the plaintiff is also unable to support her claim for retaliatory discharge. To establish a prima facie case of retaliation, the plaintiff must show: (1) that she engaged in a protected activity; (2) that she suffered an adverse employment action; and (3) a causal connection between the protected activity and the adverse employment action. Watts v. Kroger Co., 955 F. Supp. 674, 685 (N.D. Miss. 1997), aff'd, 147 F. 3d 460 (1998). The plaintiff

has failed to show the requisite causal connection between her filing of a charge of discrimination with the EEOC and her subsequent discharge. Although the plaintiff filed her initial EEOC charge on May 14, 1997, the defendant did not receive notice of the charge until at least May 29, 1997, as indicated by the EEOC's Notice of Charge of Discrimination. The evidence clearly indicates that the defendant had no notice of the plaintiff's engagement in protected activity until after her termination on May 23, 1997. Therefore, the plaintiff cannot show the causal connection required to establish a prima facie case of retaliation.

CONCLUSION

For the foregoing reasons, the court finds that the plaintiff's motion for an extension of time should be granted, the defendant's motion to strike should be denied, and the defendant's motion for summary judgment should be granted. An order will issue accordingly.

THIS, the ____ day of April, 2001.

NEAL B. BIGGERS, JR.
CHIEF JUDGE